Tetracon Engineering Sdn Bhd v Manikan a/l Sokan

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-114 OF 2009
RAUS SHARIF, SULONG MATJERAIE AND MOHD HISHAMUDIN JJCA
27 JULY 2009

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Civil Procedure — Summary judgment — Setting aside — Application for — Summary judgment obtained in absence of defendant's counsel — No explanation for absence offered — Whether summary judgment ought to be set aside — Rules of the High Court 1980 O 14 r 11

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The plaintiff sued the defendant and applied for summary judgment of its claim. At the hearing of the plaintiff's application, the defendant's counsel was absent but the registrar proceeded to hear the application and gave judgment in the plaintiff's favour on the merits. The defendant thereafter applied to set aside the order for summary judgment. The registrar, having heard arguments, granted the defendant's application and set aside the order for summary judgment. The plaintiff appealed to the judge in chambers, who allowed the appeal. In allowing the appeal, the judicial commissioner ('JC') held that the defendant ought to have appealed against the decision rather than apply to set it aside since the summary judgment was entered after the registrar had heard the merits of the application. The JC also held that the defendant had failed to furnish any reason whatsoever for the absence of its counsel. The defendant appealed to the Court of Appeal.

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Held, dismissing the appeal with costs:

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(1) An application to set aside a summary judgment must be made pursuant to O 14 r 11of the Rules of the High Court 1980 ('RHC'). Order 14 r 11 of the RHC makes no distinction between a judgment obtained after hearing the merits and a judgment obtained without hearing the merits. What r 11 means is that as long as the judgment was obtained in the absence of a party, the aggrieved party may apply to set aside the judgment under this rule (see paras 13 & 16); *Perwira Habib Bank (M) Bhd v Yap Yeng Seng* [1989] 1 CLJ 1101 referred.

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(2) The JC was correct in her finding that the defendant had failed to provide any explanation for the non-attendance of its counsel. On this ground alone the defendant's appeal ought to be dismissed (see para 17).

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(3) There was no merit in the defendant's argument that it was not served with the cause papers and hence the judgment was irregular. The

defendant was at all material times represented by solicitors and thus there was no obligation on the part of the plaintiff's solicitors to serve the cause papers or any notice on the defendant. The plaintiff's obligation was to serve the cause papers and notices to the defendant's solicitors — and this the plaintiff's solicitors did (see para 18).

(4) Whilst it was wrong and irresponsible on the part of the defendant's solicitors in not updating their client — the defendant on the progress of the case, it was equally wrong on the part of the defendant in not making inquiries with its solicitors from time to time. A litigant cannot adopt an indifferent attitude. He must take an interest in his case and he must take the initiative — indeed he has a duty — to find out from his solicitors about the progress of his case from time to time (see para 19).

(5) The defendant's allegation that the plaintiff had breached O 3 r 6 of the RHC was unfair and without substance. On the facts, there was clearly no lapse in the proceedings as alleged (see paras 20–21).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan dan memohon untuk penghakiman terus bagi tuntutannya. Semasa perbicaraan permohonan plaintif, peguam defendan tidak hadir tetapi pendaftar selanjutnya mendengar permohonan tersebut dan memberikan penghakiman bagi pihak plaintif atas merit kes tersebut. Defendan kemudiannya memohon untuk mengenepikan perintah penghakiman terus tersebut. Pendaftar, setelah mendengar hujahan-hujahan, membenarkan permohonan defendan dan mengenepikan perintah penghakiman terus tersebut. Plaintif telah merayu kepada hakim dalam kamar, yang mana membenarkan rayuan tersebut. Dalam membenarkan rayuan, pesuruhjaya kehakiman ('PK') memutuskan bahawa defendan seharusnya merayu terhadap keputusan dan bukannya memohon supaya ianya diketepikan memandangkan penghakiman terus tersebut telah dimasukkan selepas pendaftar mendengar merit permohonan tersebut. PK juga memutuskan bahawa defendan telah gagal untuk mengemukakan sebarang sebab untuk ketidakhadiran peguamnya.

Diputuskan, menolak rayuan dengan kos:

(1) Permohonan untuk mengenepikan penghakiman terus hendaklah dibuat mengikut A 14 k 11 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Aturan 14 k 11 KMT tidak membuat sebarang perbandingan di antara penghakiman yang diperoleh selepas mengambilkira meritnya dan penghakiman yang diperoleh dalam ketiadaan pihak; pihak yang terkilan boleh memohon untuk mengenepikan penghakiman di bawah kaedah ini (lihat perenggan 13 & 16); *Perwira Habib Bank Malaysia Berhad v Yap Yeng Seng* [1989] 1 CLJ 1101 dirujuk.

(2) PK adalah betul dalam penemuannya bahawa defendan telah gagal untuk memberikan sebarang penjelasan bagi ketidakhadiran peguamnya. Hanya berdasarkan alasan ini, rayuan defendan seharusnya ditolak (lihat perenggan 17).

(3) Tidak terdapat merit dalam hujahan defendan bahawa ia tidak disampaikan dengan kertas kausa dan oleh itu, penghakiman tersebut adalah di luar aturan. Defendan pada masa matan telah diwakili oleh peguam-peguam dan dengan itu, tidak terdapat sebarang kewajipan dari pihak peguam plaintif untuk menyampaikan kertas kausa atau notis-notis kepada peguam defendan — dan ini telah dilakukan oleh peguam plaintif (lihat perenggan 18).

(4) Meskipun adalah salah dan tidak bertanggungjawab bagi peguam defendan untuk tidak memberitahu pelanggannya, defendan, tentang perkembangan kes tersebut, ia juga adalah salah bagi defendan untuk tidak membuat pertanyaan kepada peguamnya dari masa ke semasa. Seorang litigan tidak boleh mengamalkan sikap endah tidak endah. Dia hendaklah mengambil tahu tentang kesnya dan patut mengambil inisiatif — yang sememangnya dia mempunyai tugas tersebut — untuk mendapat tahu daripada peguamnya tentang perkembangan kesnya dari semasa ke semasa (lihat perenggan 19).

(5) Dakwaan defendan bahawa plaintif telah melanggar A 3 k 6 KMT adalah tidak adil dan tanpa asas. Berdasarkan fakta, adalah jelas tidak terdapat sebarang perlengahan dalam prosiding seperti yang didakwa (lihat perenggan 20–21).]

Notes

For cases on setting aside, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7390–7405.

Cases referred to

Perwira Habib Bank (M) Bhd v Yap Yeng Seng [1989] 1 CLJ 1101, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 6, O 14, O 14 r 11

Appeal from: Civil Suit No S9(S7)-22–766 of 2004 (High Court, Kuala Lumpur)

Gideon Tan (Tan Yew Aik with him) (Gideon Tan Razali Zaini) for the appellant.
Arunachalam Ramiah (Lalitha Nagamuthu and Shirin with him) (Arun & Co) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal from the decision of the learned judicial commissioner

of the High Court Kuala Lumpur (Civil Division) who, on 24 April 2009, had allowed the plaintiff's appeal (vide encl 120) against the decision of the learned senior assistant registrar ('the registrar'). The registrar on 6 November 2008, vide encl 91, had allowed the application of the defendant (now, the appellant before us) to set aside an order for summary judgment obtained by the plaintiff (now, the respondent before us) on 23 June 2008.

[2] We have dismissed the appeal with costs. We now give the grounds of our decision.

[3] In this judgment, for the sake of convenience and clarity, we will be referring to the appellant as 'the defendant', and the respondent as 'the plaintiff'.

[4] In the present case, the writ action against the defendant was filed by the plaintiff on 24 May 2004.

[5] The plaintiff is a provider of transportation services. The defendant had engaged the services of the plaintiff to transport and deliver goods to various destinations. The defendant had made payments to the plaintiff for the services but the plaintiff claims that there is still an outstanding amount. In the action at the High Court, the plaintiff is claiming repayment for the unpaid amount of RM1,392,262.72.

[6] The defendant filed its statement of defence on 14 December 2004. In its statement of defence the defendant disputes the plaintiff's claim, and alleges that the services rendered by the plaintiff were inefficient and had caused the defendant to incur losses.

[7] On 1 April 2005, the plaintiff filed an application for summary judgment pursuant to O 14 of the Rules of the High Court 1980 ('the RHC'). After a long adjournment (due to reasons which we think are not relevant for the purpose of this appeal), the application was finally fixed for hearing on 23 June 2008. However, on the day of the hearing, counsel for the defendant was absent. The registrar, nevertheless, proceeded to hear the summary judgment application and made an order in favour of the plaintiff based on the merits of the application.

[8] Thereafter the defendant made an application before the registrar to set aside the order for summary judgment. The reasons given for the application

were that, firstly, the defendant was not informed by the plaintiff of the O 14 application; and secondly, the defendant has merit in its defence against the plaintiff's claim.

[9] The registrar, having heard the arguments, granted the defendant's application and set aside the order for summary judgment.

[10] The plaintiff, being dissatisfied with the setting aside order of the registrar, appealed to the judge in chambers. The learned judicial commissioner allowed the plaintiff's appeal.

[11] Hence the appeal by the defendant, that is now before us.

[12] In our judgment there is no merit in any of the arguments raised by the defendant before us.

[13] An application to set aside a summary judgment order must be made pursuant to O 14 r 11 of the RHC. The rule provides:

> Rule 11 Setting aside judgment (O 14 r 11)
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> Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the Court on such terms as it think just.

[14] In *Perwira Habib Bank (M) Bhd v Yap Yeng Seng* [1989] 1 CLJ 1101, Zakaria Yatim J (as he then was) dealt with the principles pertaining to the rule. The learned judge said (at p 1105):

> In the instant case the plaintiff made an application for summary judgment and the defendant and his counsel were absent on the date of hearing before the senior assistant registrar. An application to set aside the judgment in the absence of the defendant must be made under O 14 r 11of the Rules. See *Jaya Leasing Sdn Bhd v Madai Shipping Sdn Bhd & Ors* (Kuala Lumpur, Civil Suit No C4–232942 of 1986, unreported).
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> The principles on which judgment in default may be set aside under O 14 r 11 are the same as those under O 13 r 9. See the *Supreme Court Practice 1988*, Vol 1 at p 163. The rule for setting aside judgment in default under O 13 r 19 is that 'where the judgment was obtained regularly there must be an affidavit of merits meaning that the applicant must produce to the court evidence that he has a prima facie defence': *Evans v Bartlam* [1937] AC 473. Apart from this rule, the court would wish to be fully satisfied as to the reason for the non-attendance at the hearing of the summons of the party against whom judgment was given under O 14: *Supreme Court Practice 1988* at p 163.

[15] The first ground of the learned judicial commissioner in allowing the plaintiff's appeal is that the defendant ought to have appealed to the judge in chambers against the registrar's decision in granting the plaintiff's application for summary judgment, instead of making an application to set aside before the registrar. The learned judicial commissioner was of the view that to appeal was the appropriate recourse as the summary judgment order was made after the registrar had heard the merits of the plaintiff's application. She did not cite any authority for her view.

[16] With respect we are unable to agree with the view of the learned judicial commissioner. It is true that the registrar granted the application for summary judgment after hearing the plaintiff's counsel's submission and considering the merits of the application. However, the provision of r 11 above is clear: it merely states 'Any judgment …'. It does not specify the nature or type of judgment made. The provision makes no distinction between a judgment obtained after hearing the merits and a judgment obtained without hearing the merits. In our view, what r 11 means is that as long as the judgment was obtained in the absence of a party, the aggrieved party may apply to set aside the judgment pursuant to this rule.

[17] The second ground of the learned judicial commissioner for allowing the plaintiff's appeal before her is that the defendant, when making the application to set aside, had failed to furnish any reason whatsoever for the absence of their counsel. We have examined the defendant's affidavits in support of encl 91 and, with respect, we are of the view that the learned judicial commissioner was correct in her finding that the defendant had failed to provide any explanation for the non-attendance of their counsel. In fact we note that the defendant's counsel concerned did not affirm any affidavit at all. On this ground alone the defendant's appeal before us ought to be dismissed.

[18] We further find that there is no merit in the defendant's argument that the defendant was not served with the cause papers and hence the judgment was irregular. The defendant at the material time was represented by solicitors, namely, Messrs Muhammad Ganesan & Nazri. This being the case, there was no obligation on the part of the plaintiff's solicitors to serve the cause papers or any notice on the defendant. The plaintiff's obligation was to serve the cause papers and notices (if any) to the defendant's solicitors — and this the plaintiff's solicitors did. The plaintiff has affirmed an affidavit stating that all cause papers, including a notification of the hearing date of 23 June 2008, have duly been served on the defendant's solicitors at the material time. The defendant in their affidavits has not rebutted the plaintiff's averments but

merely alleges the irresponsible attitude of their solicitors in not updating them on the progress of the plaintiff's application.

[19] We wish to say that whilst it was wrong and irresponsible on the part of the defendant's solicitors in not updating their client (the defendant) on the progress of the case, it was equally wrong on the part of the defendant in not making inquiries with their solicitors from time to time. The obligations are mutual. It is not clearly stated in the defendant's affidavits as to when was the last time that they communicated with their solicitors, Messrs Muhammad Ganesan, but learned counsel for the defendant, in his written submission, states that after 29 January 2007 (the date when the plaintiff's application to take accounts was dismissed by the court) the defendant did not receive any further updates from their solicitors. The defendant alleges that they had no knowledge about the progress of the case including the plaintiff's O 14 application (see para 5 of the defendant's affidavit in support of their setting aside application). Now, this is remarkable as a litigant cannot adopt an indifferent or a lying down attitude. He must take an interest in his case and he must take the initiative — indeed, he has a duty — to find out from his solicitors about the progress of his case from time to time.

[20] Now, there is one final matter. Before us it is alleged by learned counsel for the defendant in his written submission that the plaintiff intentionally concealed the fact that he took about a year to resume the court proceedings at the High Court after the dismissal of the plaintiff's application to take accounts on 29 January 2007. Counsel contends that the conduct of the plaintiff is in breach of O 3 r 6 of the RHC. Order 3 r 6 stipulates:

> 6 Notice of intention to proceed after a year's delay (O 3 r 6)
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> Where a year or more has lapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.
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> A summons on which no order was made is not a proceeding for the purpose of this rule.

[21] Our observation is that this allegation about a lapse in the proceeding is unfair and without substance. The truth of the matter is that, before resuming with his O 14 application on 23 June 2008, the plaintiff had in January 2008 (that is to say, about six months earlier) made applications to amend the writ, statement of claim and summons in chambers (for the O 14 application), which applications were not objected to by the defendant's solicitors who had been duly informed of the applications; and had duly obtained the necessary orders on 11 April 2008 (which orders were neither set aside nor appeal against by the defendant). Clearly there was no lapse in the proceedings as alleged.

[22] Accordingly, we are unanimous that this appeal be dismissed with costs. Deposit to the plaintiff to account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon